Penguasa (Jabatan Tanah & Survei, Bintulu) & Ors v Amit bin Salleh & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO O-01–61 OF 2005
JAMES FOONG, HASAN LAH AND ABU SAMAH JJCA
28 APRIL 2008

Native Law and Custom — Land dispute — Customary rights over land — Dealings in native land — Agreement to jointly develop land with non-native — Whether agreement illegal — Whether trees planted on land through unlawful use and occupation — Whether respondents should be compensated for deprivation of valuable cultivated crops when Extinguishment Direction came into effect — Whether unfair, unreasonable and against public policy to compensate respondents for trees planted on land — Sarawak Land Code

The respondents were natives of Sarawak occupying Lot 3, Block 52, Kemena Land District ('the land') that was declared a native communal reserve for the exclusive use by their communities for agricultural purpose. However, when a Native Communal Reserve (Cessation) Order ('Cessation Order') was issued on 7 December 1998, the land ceased to be a native communal reserve. Following the Cessation Order, the respondents' native rights over the said land were extinguished by a Land Extinguishment of Native Customary Rights Direction 1998 ('Extinguishment Direction'). Prior to the extinguishment of their rights and while they were in lawful occupation of the land, the respondents had entered into a joint venture agreement ('JV') with a company known as Bumisar Mewah Sdn Bhd ('Bumisar') to develop the land for agricultural purposes. Under the terms of the JV, the respondents and Bumisar had agreed to form a joint venture company known as Bumisar Jaya Sdn Bhd ('Bumisar Jaya'). The terms of the JV provided, inter alia, that Bumisar Jaya would submit to the relevant authorities a proposal to plant oil palm and other crops on the land and that the respondents would apply to the authorities to convert the land from communal reserve land to mixed zone land for a term of at least 60 years. Pending the approval of the various requests, the respondents with the aid of Bumisar Jaya planted teak and setang trees on the land. Before the coming into force of the Cessation Order and the Extinguishment Direction, the parties terminated the JV, by mutual agreement. The respondents who were deprived of their native rights by the Cessation Order, filed a claim in the High Court against the appellants for, inter alia, special damages of RM110,493,180, being the value of the loss of the trees and the deprivation of their customary rights, and general damages.

After the close of pleadings, the respondents filed an application under O14A of the Rules of the High Court 1980 requesting the court to answer certain questions which would dispose of the case. The High Court held that the respondents had acquired native customary rights over the land by virtue of the native communal reserve order. The High Court also was of the view that although the JV, which sought to transfer rights or privileges over native area land to a non-native company, was void for illegality, the respondents were not attempting to recover the consideration from the JV but damages from the loss of the trees planted on the land and that they were entitled to be compensated for the loss of their communal rights as well as for the crops. This was an appeal against the order that the appellants pay damages to the respondents. It was the appellants' contention that the trees were planted on the respondents' land by a non-native in contravention of the express purpose for which the native communal reserve was created, ie for the exclusive use of the native and that since the trees were planted through unlawful use and occupation of the land and pursuant to an illegal JV agreement, the respondents should not reap the benefits of their inequity.

Held, dismissing the appeal with costs:

(1) Having examined the principal terms of the JV, it would appear that the respondents did not contravene the Sarawak Land Code ('the Code'). The JV was a conditional agreement in that it required, firstly, approvals from the authorities for the planting of oil palm and other agricultural products on the land and secondly, approvals from the authorities for the alienation and conversion of the land into a mixed zone land before it could be transferred to Bumisar Jaya. When an agreement contains terms that required compliance with statutory provisions then such an agreement could not be void for illegality. Thus, the High Court judge had erred in concluding that the JV was void for illegality (see para 19).

(2) Although the JV was valid, there was no reference in it of any arrangement or permission granted by the respondents to Bumisar Jaya to plant the trees on the land until the prior approval of the authorities. In the absence of this, the respondents could not be said to have contravened s 8 of the Code. Since the JV made no provision for the planting of the trees until permission is obtained, it was necessary to turn to the evidence to discover who was responsible for the planting of the trees. The evidence implied that it was the respondents who planted the trees except that the actual act of planting was carried out by Bumisar Jaya. Thus, the respondents were at all material times the principal and, as such, they did not contravene any provision of the Code in cultivating the trees. The view advanced by the appellants that Bumisar Jaya was in unlawful occupation of the land while carrying out

A the act of cultivating the trees on the land for and on behalf of the respondents was a narrow, restrictive and unrealistic approach of construing s 10(2) of the Code. It was true that the trees were planted by Bumisar Jaya, a person not exempted under s 10(2) of the Code to occupy the land, but Bumisar Jaya were on the land to just plant the B trees and not take possession of the land. Without these essential elements satisfied, there was no proof that Bumisar Jaya had unlawfully used and occupied the land (see paras 22–23 & 26–27).

(3) Section 5(3) of the Code associates compensation with the C extinguishment of native customary rights. As cultivation on the said land is a customary right under s 5(2)(c) of the Code, and as cultivation means the planting of any form of crops in the soil, it must also include trees that can be harvested. Therefore, the deprivation of these cultivated crops must be compensated when the extinguishment D direction came into effect. The word 'compensation' in s 5(3) of the Code must be given a purposive interpretation since the entire objective of the provision is to place in the hands of the owners expropriated the full money equivalent of the thing for which they have been deprived. Therefore since the appellants deprived the respondents of their crops, E the appellants must compensate them for such deprivation (see paras 32–33).

(4) If compensation was not paid for the trees, the appellants would be the sole beneficiaries of the valuable trees without having put in any effort F nor spending any money for them. It would therefore appear that the scale of equity tilted against the appellants. In any case, as equity follows the law and the law depicts that the respondents should be compensated, the question of morality and public policy must make way for the law (see para 35).

G **[Bahasa Malaysia summary**

Responden-responden adalah anak-anak negeri Sarawak yang menetap di Lot 3, Blok 52, Daerah Tanah Kemena ('tanah tersebut') yang H diisytiharkan sebagai rizab komunal anak negeri untuk penggunaan eksklusif oleh komuniti mereka bagi tujuan pertanian. Walau bagaimanapun, apabila Perintah (Pemberhentian) Rizab Komunal Anak Negeri ('perintah pemberhentian') dikeluarkan pada 7 Disember 1998, tanah tersebut tidak lagi menjadi rizab komunal anak negeri. Menurut perintah pemberhentian I itu, hak-hak anak negeri responden-responden ke atas tanah tersebut dilupuskan oleh Arahan Pelupusan Hak-Hak Tanah Adat Anak Negeri 1998 ('arahan pelupusan'). Sebelum pelupusan hak-hak mereka dan semasa mereka masih menetap secara sah atas tanah tersebut, responden-responden telah memasuki perjanjian usahasama ('JV') dengan sebuah syarikat yang dikenali

sebagai Bumisar Mewah Sdn Bhd ('Bumisar') untuk memajukan tanah tersebut untuk tujuan pertanian. Di bawah terma-terma JV tersebut, responden-responden dan Bumisar bersetuju untuk membentuk syarikat usahasama yang dikenali sebagai Bumisar Jaya Sdn Bhd ('Bumisar Jaya'). Terma-terma JV tersebut memperuntukkan, antara lain, bahawa Bumisar Jaya akan mengemukakan kepada pihak-pihak berkuasa yang berkaitan satu cadangan untuk menanam kelapa sawit dan tanaman-tanaman lain atas tanah tersebut dan bahawa responden-responden akan memohon kepada pihak-pihak berkuasa untuk menukarkan tanah tersebut daripada tanah rizab komunal kepada tanah zon campuran bagi tempoh sekurang-kurangnya 60 tahun. Sementara menunggu kelulusan pelbagai permohonan, responden-responden dengan bantuan Bumisar Jaya telah menanam pokok-pokok jati dan setang atas tanah tersebut. Sebelum berkuat kuasanya perintah pemberhentian dan arahan pelupusan tersebut, pihak-pihak telah menamatkan JV tersebut, melalui persetujuan bersama. Responden-responden yang kehilangan hak-hak anak negeri mereka oleh perintah pemberhentian tersebut, memfailkan tuntutan di Mahkamah Tinggi terhadap perayu-perayu untuk, antara lain, ganti rugi sejumlah RM110,493,180, yang merupakan nilai kerugian untuk pokok-pokok tersebut dan penafian hak-hak adat mereka, dan ganti rugi am. Selepas pliding ditutup, responden-responden memfailkan permohonan di bawah A 14A Kaedah-Kaedah Mahkamah Tinggi 1980 memohon mahkamah menjawab persoalan-persoalan tertentu yang akan menyelesaikan kes. Mahkamah Tinggi memutuskan bahawa responden-responden telah memperoleh hak-hak adat anak negeri ke atas tanah tersebut menurut perintah rizab komunal anak negeri. Mahkamah Tinggi juga berpendapat bahawa meskipun JV tersebut, yang memohon untuk memindahkan hak-hak atau hak istimewa ke atas kawasan tanah anak negeri tersebut kepada syarikat bukan anak negeri, adalah tidak sah kerana menyalahi undang-undang, responden-responden bukan mencuba untuk mendapatkan balasan daripada JV tersebut tetapi ganti rugi akibat kerugian pokok-pokok yang telah ditanam atas tanah tersebut dan bahawa mereka berhak diberikan pampasan kerana kehilangan hak-hak komunal mereka dan juga untuk tanaman-tanaman tersebut. Ini adalah rayuan terhadap perintah tersebut agar perayu-perayu membayar ganti rugi kepada responden-responden. Adalah pendapat perayu-perayu bahawa pokok-pokok yang ditanam atas tanah responden-responden oleh mereka yang bukan merupakan anak negeri bertentangan dengan tujuan nyata rizab komunal anak negeri tersebut dibentuk, iaitu untuk penggunaan eksklusif anak negeri dan bahawa memandangkan pokok-pokok tersebut ditanam untuk penggunaan dan pendudukan tanah yang menyalahi undang-undang dan menurut perjanjian JV yang menyalahi undang-undang, responden-responden tidak patut memperoleh faedah daripada ketidaksaksamaannya.

Diputuskan, menolak rayuan dengan kos:

(1) Setelah meneliti terma-terma utama, JV tersebut, adalah jelas bahawa ia tidak melanggar Kanun Tanah Sarawak ('Kanun'). JV tersebut merupakan perjanjian bersyarat yang mana ia memerlukan, pertamanya, kelulusan daripada pihak berkuasa untuk menanam kelapa sawit dan hasil pertanian lain atas tanah tersebut dan keduanya, kelulusan daripada pihak berkuasa untuk pemerolehan dan penukaran tanah tersebut kepada tanah zon campuran sebelum ia boleh dipindahkan kepada Bumisar Jaya. Apabila perjanjian mengandungi terma-terma yang memerlukan pematuhan peruntukan statutori maka perjanjian itu tidaklah terbatal kerana menyalahi undang-undang. Oleh itu hakim Mahkamah Tinggi terkhilaf dalam memutuskan bahawa JV tersebut adalah tidak sah kerana menyalahi undang-undang (lihat perenggan 19).

(2) Meskipun JV tersebut adalah sah, tiada rujukan di dalamnya tentang apa-apa penentuan atau kebenaran diberikan oleh responden-responden kepada Bumisar Jaya untuk menanam pokok-pokok atas tanah tersebut sehingga kelulusan terdahulu pihak berkuasa. Dalam ketiadaan ini, responden-responden tidak boleh dikatakan telah menentang s 8 Kanun tersebut. Memandangkan JV tersebut tidak membuat sebarang peruntukan tentang penanaman pokok-pokok sehingga kebenaran diperoleh, adalah perlu untuk melihat keterangan bagi menentukan siapa yang bertanggungjawab menanam pokok-pokok tersebut. Keterangan menyatakan bahawa responden-respondenlah yang menanam pokok-pokok tersebut kecuali perbuatan sebenar menanam telah dijalankan oleh Bumisar Jaya. Oleh itu, responden-responden pada setiap masa material merupakan prinsipal dan, oleh itu, mereka tidak melanggar mana-mana peruntukan Kanun tersebut dalam menanam pokok-pokok tersebut. Pendapat yang diutarakan oleh perayu-perayu bahawa Bumisar Jaya menduduki tanah tersebut secara tidak sah semasa menjalankan aktiviti menanam pokok-pokok atas tanah tersebut dan bagi pihak responden-responden merupakan pendekatan yang sempit, terbatas dan tidak realistik dalam mentafsirkan s 10(2) Kanun tersebut. Adalah benar bahawa pokok-pokok tersebut telah ditanam oleh Bumisar Jaya, seorang yang tidak dikecualikan di bawah s 10(2) Kanun tersebut untuk menduduki tanah itu, tetapi Bumisar Jaya berada atas tanah tersebut hanya untuk menanam pokok-pokok tersebut dan tidak mengambil pemerolehan tanah tersebut. Tanpa elemen-elemen penting tersebut dipenuhi, tiada bukti bahawa Bumisar Jaya telah menyalahi undang-undang kerana menggunakan dan menduduki tanah tersebut (lihat perenggan 22–23 & 26–27).

(3) Seksyen 5(3) Kanun tersebut mengaitkan pampasan dengan pelupusan hak-hak adat anak negeri. Oleh kerana penanaman atas tanah tersebut merupakan hak adat di bawah s 5(2) Kanun tersebut, dan oleh kerana penanaman bermaksud menanam apa-apa bentuk tanaman atas tanah, ia juga termasuklah pokok-pokok yang boleh dituai. Oleh itu, penafian tanaman-tanaman yang ditanam hendaklah dipampas apabila arahan pelupusan berkuat kuasa. Perkataan 'pampasan' dalam s 5(3) Kanun hendaklah diberikan tafsiran bermaksud memandangkan objektif keseluruhan peruntukan tersebut adalah untuk memberikan pemilik-pemilik yang telah dieksspropriasi wang sepenuhnya yang sama dengan apa yang patut mereka terima. Oleh itu memandangkan perayu-perayu telah menafikan responden-responden tanaman-tanaman mereka, perayu-perayu perlu memberi pampasan kepada mereka untuk penafian tersebut (lihat perenggan 32–33).

(4) Sekiranya pampasan tidak dibayar untuk pokok-pokok tersebut, perayu-perayu akan menjadi satu-satunya benefisiari ke atas pokok-pokok berharga tersebut tanpa perlu berusaha mahupun membelanjakan wang untuknya. Ia kelihatan bahawa skala ekuiti berpihak terhadap perayu-perayu. Dalam apa keadaan pun, memandangkan ekuiti mengikut undang-undang dan undang-undang menggambarkan bahawa responden-responden patut diberikan pampasan, persoalan moral dan polisi awam perlu memberi jalan kepada undang-undang (lihat perenggan 35).]

Notes

For cases on customary rights over land, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 652–659.

Cases referred to

Foo Say Lee v Ooi Heng Wai [1969] 1 MLJ 47 (folld)

Haji Hamid bin Ariffin & Anor v Ahmad bin Mahmud [1976] 2 MLJ 79 (folld)

Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd [1999] 3 MLJ 489 (refd)

Legislation referred to

Land Extinguishment of Native Customary Rights (Similajau Area) (No 106) Direction 1998
Native Communal Reserve (Cessation Order) 1999
Rules of the High Court 1980 O 14A
Sarawak Land Code ss 5, 5(2)(c), 5(3), 5(3)(a), 8, 8(b), 10(2), 61, 209

Appeal from: Suit No 22–21 of 2000 (High Court, Bintulu)

A

Thomas Akin Jelimin (Kezia Norella Daim with him) (State Attorney-General Chambers) for the appellant.

MS Sandhu (John Antau and Musa Dinggat with him) (Tang & Antau & Co) for the respondent.

B

James Foong JCA (delivering judgment of the court):

INTRODUCTION

C

[1] This is an appeal against the decision of the High Court of Sabah and Sarawak at Bintulu which answered two questions framed by the said court in the affirmative followed by issuing an order that the appellants pay damages to be assessed to the respondents.

D

BACKGROUND

[2] The respondents are natives of the Kedayan/Melanau/Malay communities of Kuala Nyalau & Ulu Nyalau, Suai (communities). By a E Native Communal (Agriculture) Reserve Order 1987 ('Native Communal Reserve Order'), made pursuant to s 6(1) of the Sarawak Land Code ('Land Code'), the land they occupied known as Lot 3, Block 52, Kemena Land District ('said land'), consisting of approximately 1,223 hectares was declared a native communal reserve for the exclusive use by their communities for F agricultural purpose. The said land however ceased to be a native communal reserve in 1999, when a Native Communal Reserve (Cessation) Order ('Cessation Order') was issued on 7 December 1998. Following the Cessation Order, the respondents' native rights over the said land were extinguished by a Land Extinguishment of Native Customary Rights (Similajau Area) (No G 106) Direction 1998 ('Extinguishment Direction'). To replace the said land, the respondents were given another piece of land known as Lot 2, Block 51, Kemena Land District (Lot 2). However, while they were in lawful occupation of the said land, the respondents had on 16 September 1994, entered into a joint venture agreement ('the JV agreement') with a company H known as Bumisar Mewah Sdn Bhd ('Bumisar') to develop the said land for agricultural purposes. Under the terms of the JV agreement, the respondents and Bumisar were to form a joint venture company known as Bumisar Jaya Sdn Bhd ('Bumisar Jaya'), and in this company the plaintiff were to be issued with 25% of the shares whilst Bumisar were to get 75%. It was a term of the I JV agreement that Bumisar Jaya would submit to the relevant authorities a proposal to plant oil palm and other crops on the said land. In addition, the respondents were to apply to the authorities to convert 'the said land from native communal reserve to a mixed zone land for a term of at least sixty (60) years'. Pending all these, the respondents, through Bumisar Jaya, planted teak

and *setang* trees on the said land. According to the respondents there are now (a) 713,390 teak trees; (b) 3,697 *setang* trees and; (c) 11,000 teak seedlings (all collectively known as 'the said trees'). By the end of 1998, the teak and *setang* trees were about 40 feet tall with a girth of up to 24 inches; all ready to be harvested. Their value, according to the respondent, is RM101,932,180.

[3] On 16 March 1997, by mutual agreement, the JV agreement was terminated by the parties. This was before the coming into force of the Cessation Order and the Extinguishment Direction.

[4] Deprived of their native rights over the said land due to the cessation order and the extinguishment direction, the respondents filed this claim against the appellants seeking:

(a) special damages of RM110,493,180 which is made up of RM101,932,180 for the loss of the trees and seedlings and RM8,561,000 for deprivation of their customary rights and native customary land;

(b) general damages;

(c) alternatively for compensation for losses due to the deprivation of their rights, particularly in having to abandon the said tress cultivated on the said land;

(d) interest and costs.

[5] After the close of pleadings, the respondents filed a summons in chambers under O 14A of the Rules of the High Court ('the RHC') requesting the High Court to answer several questions which answers will dispose of the case. From the original five questions, the High Court narrowed down to two and rephrased them as follows:

(i) Did the respondents acquire native customary rights over the said land by virtue of the native communal reserve order?

(ii) If the answer to the first question is in the affirmative, are the respondents entitled to be compensated for the crops (including the trees of commercial value) planted on the said land under the JV agreement with a non-native company when the native customary rights were extinguished by the Extinguishment Direction?

Answer to the first question

[6] To the first question, the learned High Court judge answered it in the affirmative stating:

A In my opinion the concession by the learned state legal officer Susan Gau that the plaintiffs are natives covered by the 1987 Order renders the question (of) whether the plaintiffs (are) the natives (of the) community under that order as a non-issue.

B **[7]** This concession referred to concerns a preliminary point raised by the trial judge as to 'whether the defendants still stand by their denial that the plaintiffs are not natives belonging to the Kedayan/Melanau/Malay communities of Kuala Nyalau and that they do not have customary rights over the said land'. To this, 'the learned state legal officer conceded that for the purpose of the present application the plaintiffs are natives covered by the C 1987 Order'.

[8] As the appellants did not challenge the answer to this first question, it must be implied that they have accepted the answer of the High Court as correct ie the respondents had acquired native customary rights over the said D land by virtue of the native communal reserve order.

Answer to the second questions

E **[9]** The High Court answered the second question also in the affirmative. The reasons provided are observed in the following passages of the judgment:

> Is the joint venture agreement (a) void agreement under s 24 of the Contracts Act 1950? The joint venture agreement was between the plaintiffs and BMSB (Bumisar) who was non-native. The objective of the joint venture agreement was F to develop Lot 3 on joint venture basis ... At this point it is to be observed that there is nothing in the Code or in any other written law that I am aware of that prohibits the natives to enter into joint venture agreement and formed a joint venture company with a non-native. However the question as to the legality of the joint venture company in this case must also take into consideration the provision G of s 8(b) of the Code. Under this section an agreement is deemed to have been entered into for illegal consideration if it transfers or confers any rights or privileges over native area land, native customary land or interior area land to non native; or which would result in such person enjoying any such right or privilege ... If the alienation of the land to the joint venture company had gone through, the land H would be practically transferred to a non-native. To my mind such provisions as to the alienation of the land to the joint venture company is clearly offensive to s 8(b) of the SLC (Code) ... Thus I conclude that the joint venture agreement is null and void.
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> Having found the joint venture agreement between the development committee, I that represented the plaintiffs, and the BMSB is void, can the plaintiffs recover damages or be compensated for the loss suffered due to the destruction of the crops on their land particularly the commercially valuable *setangs* and teaks? Learned counsel for the plaintiffs submitted that they could... Learned SLO (state legal officer) disagrees with the submissions by learned counsel for the plaintiffs. She advanced two reasons: Firstly, under s 8(b) of the Code any consideration which

shall have been paid or furnished shall not be recoverable in any court nor shall any relief be afforded to any person claiming that any consideration promised has not be paid or furnished. Secondly, the joint venture agreement being an illegality, the right to the trees planted on Lot 3, the said land, cannot 'devolve' from non-natives to the natives ... The trees formed part of the land and the land remained as native communal reserve after the rescission of the joint venture agreement. Therefore when the reserve is extinguished the natives are entitled to be compensated for the lost of their communal reserve as well as for their crops. Furthermore the rescission of the joint venture agreement took place long before the extinguishment of the reserve by the defendants. Thus at the time when the defendants gazetted the 1999 Order the communal reserve was not subject to any joint venture agreement between the natives and non natives. The reserve wholly belonged to the natives then.

[10] To summarise, the approach of the High Court is this:

(i) Though the JV agreement is void for illegality, the respondents are not attempting to recover the consideration made therein.

(ii) The said trees are things attached to the said land by virtue of s 2 of the code which declares that 'land' includes things attached to earth or permanently fastened to anything attached to the earth.

(iii) 'Therefore, when the reserve is extinguish (sic) the natives are entitled to be compensated for the lost (sic) of the communal reserve as well as for the crops', especially so when JV agreement had been terminated and was no longer operative.

[11] Though accepting the ruling of the High Court on the JV agreement being void for illegality, the appellants however argued as follows:

(1) Bumisar Jaya, not being and incapable of being a native within the definition of the Code, were allowed to enter into the said land to plant the said trees. This is in contravention of s 10(2) of the Code which says:

> No person whether a native or non-native may occupy any Native Customary Land or any Reserved Land save under and in accordance with the conditions applicable thereto by virtue of this or any other written law, and any person in occupation thereof shall be deemed to be in unlawful occupation of State Land and s 209 shall apply thereto.

(2) Since the said trees were planted 'through unlawful use and occupation of the said land (which is always state land) and pursuant to an illegal agreement which has been declared null and void', then the respondents should not reap the benefits sowed by seeds of inequity. For support, the appellants cited the case of *Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd* [1999] 3 MLJ 489 where it says at p 492:

Encik Ahmadi, the learned legal advisor, had argued that the warehouse, in the admitted absence of planning permission, was illegally located on the subject property. The respondent, he argues, ought not to benefit from his own wrong. He has further submitted that para 1(3)(b) of the First Schedule when properly interpreted excludes from consideration a building built unlawfully upon land that is being acquired. I am in full agreement with his submission.

Quite apart from the construction of para 1(3)(b) of the First Schedule, there is a principle of great antiquity that a litigant ought not to benefit from its own wrong. Although of universal application, it has been restated when applied to a particular context. For example, the principle when applied in the context of the law of contract may be formulated as follows: a party ought not to be permitted to take advantage of his own breach. See *Alghussein Establishment v Eton College* [1988] 1 WLR 587; *New Zealand Shipping Co Ltd v Societe Des Ateliers Et Chantiers De France* [1919] AC 1.

But as I have said, the principle is of universal application. In the context of the present case, that principle produces the following result. A land owner who has erected a building on his land contrary to law ought not to receive any benefit from it from an acquiring authority under the Act.

(3) Compensation for the extinguishment of the native customary rights is only for the land per se, not for the said trees planted thereon. Nonetheless, the respondents had been duly compensated with the replacement Lot 2.

(4) Hence it is unfair, unreasonable, morally wrong and against public policy, for the High Court to order the appellants to compensate the respondents for the trees which (a) formed part of the state land, and (b) were planted thereon by a non-native in contravention of the express purpose for which the native communal reserve was created, ie for the exclusive use of the native, and no non-native may be permitted to use or occupy the land for the planting of the teak and *setang* trees.

[12] I shall consider each of these contentions in turn.

First contention: The respondents should not be entitled to benefit from their own wrong

[13] This first contention of the appellants touches on two factors: (a) the said trees were planted through unlawful use and occupation of the said land and; (b) the said trees were planted pursuant to an illegal agreement. As the High Court was of the opinion that the JV agreement is void for illegality, I shall deal with this second factor first.

[14] Were the said trees planted pursuant to an illegal agreement?

[15] To ascertain this, I ask the following questions: (a) is the agreement illegal and; (b) were the trees planted pursuant to this agreement?

Is the JV agreement illegal?

[16] In order to answer this, one must examine the contents of the JV agreement against the provision of the law alleged to be contravened.

[17] The recital and the operative part of the JV agreement reveal that the objective of the parties was to enter into a business venture by setting up Bumisar Jaya to develop the said land for agricultural purposes. The shares holdings in this joint venture company were in the proportion as disclosed. Under cl 2 of this agreement, Bumisar Jaya was to apply to the authorities concerned 'for plantation of oil palms and for other agricultural purposes and shall commence and proceed with the plantation works on approval of the said proposals'. And in cl 3, it is stipulated that 'the development committee (respondents) shall apply to the authorities concerned for the alienation or transfer of the said land to the joint venture company (Bumisar Jaya Sdn Bhd) and for conversion of the said land from native communal reserve into mixed zone land for a term of at least sixty (60) years'.

[18] It is alleged that by these terms, the parties had contravened s 8(b) of the Code which declares:

> 8 Save as provided in section 9 —
>
> (a) a person who is not a native of Sarawak may not acquire any rights or privileges whatever over any Native Area Land, Native Customary Land or Interior Area Land;
>
> (b) any agreement, purporting to transfer or confer any such rights or privileges or which would result in such person enjoying any such right or privilege, shall be deemed to have been entered into for an illegal consideration; and, in particular but without prejudice to para (d), any consideration which shall have been paid or furnished shall not be recoverable in any court nor shall any relief be afforded to any person claiming that any consideration promised has not been paid or furnished;
>
> (c) any person purporting to enter into an agreement to which para (b) applies shall be guilty of an offence ...
>
> (d) in any case in which a person is convicted of an offence under para (b), the court may, if there is reason to believe that such person did not appreciate he was contravening para (a) ...

(e) subject as aforesaid and to any remedy for the recovery of any fine imposed, the rights and privileges of any native shall not be adversely affected by any agreement to which para (b) applies.

[19] Having examined these principal terms of the JV agreement, I am of the opinion that they do not contravene this provision of the Code. The reason is simply this: the JV agreement was a conditional agreement. It was conditional upon approvals from the authorities for the planting of oil palm and other agricultural products on the said land. Further, it was conditional upon the approval by the authorities for alienation and conversion the said land into a mixed zone land before it could be transferred to Bumisar Jaya. This agreement conferred no right or privilege on Bumisar Jaya to deal with the said land until these pre-conditions were met. When an agreement contains terms that require compliance with statutory provisions then such agreement cannot be void for illegality. The Federal Court case of *Foo Say Lee v Ooi Heng Wai* [1969] 1 MLJ 47 supports this. There, the plaintiff had entered into an agreement with the defendant to purchase the defendant's Malay reserve land in Kelantan. The agreement stipulates that the sale is subject to the approval of the Kelantan State Government and Ruler in Council. In declaring the agreement is not null and void for illegality the Federal Court said:

> If you read s 12(i) carefully, it will be apparent that only attempts to deal in reservation land contrary to the provisions of the Enactment (the underlining is mine) would be null and void so that though the agreement between the two parties could be regarded as an attempt to deal in reservation land it is not in my view, an attempt to deal in the land contrary to the provisions of the Enactment.

[20] This approach was reaffirmed by the Federal Court in *Haji Hamid bin Ariffin & Anor v Ahmad bin Mahmud* [1976] 2 MLJ 79 where Suffian LP observed:

> Be it noted that the purported sale here was an 'outright' sale. I would be inclined to consider it valid if it had been conditional and expressed to be subject to the State Authority (1) allowing the land to be excised under s 4 or (2) agreeing to declare the Siamese lady a Malay for the purposes of the Enactment under s 19, for such an agreement of sale does not purport to vest in a non-Malay right or interest in Malay Reservation land and is not 'contrary to the provisions of sub-s (1) of s 6, vide *Foo Say Lee v Ooi Heng War*.

[21] Based on these authorities, I am of the view that the learned trial judge has erred in concluding that the JV agreement is void for illegality.

Were the said trees planted pursuant to the JV agreement?

[22] Even if the JV agreement was valid what about the said trees planted on the said land for the purpose of compensation? To answer this, I return to the terms of the JV agreement. There is no mention in this deed of any arrangement or permission granted to Bumisar Jaya by the respondents to plant the said trees on the said land until the prior approval of the authorities. In the absence of this, the respondents cannot be said to have contravened s 8 of the Code by virtue of the agreement.

Who planted the said trees?

[23] Since the JV agreement makes no provision for the planting of the said trees until permission is obtained, then who planted these trees? For this, I turn to the evidence. What is recorded is that 'the plaintiff planted the said trees *through* Bumisar Jaya'. In my view, this statement implies that it was the respondents who planted the said trees except that the actual act of planting was carried out by Bumisar Jaya. Bumisar Jaya carried out this task for and on behalf of the respondents. The respondents were at all material time the principal and as principal they did not contravene any provision of the Code in cultivating the said trees.

Were the said trees planted through unlawful use and occupation of the said land?

[24] Perhaps in anticipation of the abovementioned approach, the appellants now argue before us that the said trees were planted through unlawful use and occupation of the said land. They said that the 'joint venture company must have occupied the land in the process of planting the trees, as no one could have planted these trees without going onto and staying on or occupying the land having regard to the huge number of trees *allegedly* planted as deposed in the affidavit of learned counsel for the respondents'.

[25] When the appellants presented this argument they must had in mind s 10(2) of the Code. Under this provision of the law, no person except those exempted 'may occupy' the said land and any person 'in occupation thereof shall be deemed to be in unlawful occupation of state land'. But was the planting of the said trees by Bumisar Jaya considered occupying the said land? The appellants argued that since this act of planting involved being in and on the said land it would definitely constitute occupying the said land.

[26] In my view, this is a narrow, restrictive and unrealistic approach. If adopted it would cover virtually anyone entering the said land apart from the respondents and those they represent. It would even extend to essential service providers who are required to stay over on the said land. This would

include doctors and nurses who had to stay over on the said land for a number of days to treat the natives. If one were to construe s 10(2) of the Code the way the appellant encouraged us to, then all these personnel would have breached s 10(2) and liable to be punished under s 209 of the Code. When this happens, the respondents would be forced into isolation as no one apart from the natives living there would risk entering the said land to provide assistance for fear of prosecution. Certainly this could not have been the intention of the Legislature when they enacted s 10(2) of the Code.

[27] According to the *Oxford English Dictionary*, volume VII, the word 'occupy' denotes 'the taking of possession for one's use' or 'to hold on to possession of something'. No doubt the said trees were planted by Bumisar Jaya, a person not exempted under s 10(2) of the Code to occupy the said land, but by merely planting the said trees thereon Bumisar Jaya was not taking possession of the said land for it did not intend to hold onto the said land. Bumisar Jaya was just there to plant the said trees. Without these essential elements satisfied, there is no proof that Bumisar Jaya had unlawfully used and occupied the said land.

[28] Since the respondent had committed none of the alleged wrongs, I conclude by saying that the principle of antiquity where a person should not benefit from his own wrong is inappropriate for application in this instant case.

Second contention: Compensation for loss of land per se

[29] In this second contention, the appellants argued that the respondents should not be compensated since they were given a piece of replacement land. Compensation, according to the appellants, is only for the land per se and not for the trees planted thereon.

[30] When this same issue was raised in the High Court, it was dismissed in this manner:

> *Setang* and teak are commercially valuable trees ... They planted them with a view of harvesting them when they reached maturity and sell them as the produce of the land to earn income from the land. Therefore in my view it would be reasonable to treat the value of the land and that of the trees as a separate item of value for the purpose of determining the compensation payable to the plaintiffs following the extinguishment of their native communal reserve. It will be observed that the proviso to sub-s (3) of s 5 of the Code seems to make this approach possible. The proviso speaks about paying compensation 'with or without the payment of additional compensation whether for disturbance, or for the costs of removal, or otherwise'. The use of the words 'additional compensation, and or otherwise' in the proviso in my opinion removes any doubt that one may have as to the range of

compensation that may (be) payable to the natives whose customary rights have been extinguished. In my view it is reasonable to conclude that this would include compensating the natives for the loss suffered when their crops on the land, which they have grown for their income, are destroyed. The *setangs* and the teaks are, in this instant case, is (sic) in this category ...

The trees formed part of the land and the land remained as native communal reserve after the rescission of the joint venture agreement: Therefore when the reserve is extinguished (sic) the natives are entitled to be compensated for the lost of their communal reserve as well as their (sic) for their crops.

[31] There is much force in this approach but I would prefer another way of looking at it. The provision for compensation in the event of extinguishment of a customary right over native land is s 5(3)(a) of the Code which says:

Any native customary rights may be extinguished by direction issued by the Minister ...

Provided that where such rights are extinguished in pursuance of this section compensation shall be paid to any person who can establish his claims to such rights in accordance with paragraphs (b) and (c); or other land over which such rights may be exercised may be made available to him with or without the payment of additional compensation whether for disturbance, or for the costs of removal, or otherwise.

[32] This particular section associates compensation with the extinguishment of native customary rights. Because the respondents' customarily rights over the said land were extinguished, they ought to be compensated. When this is the objective of the law, then it is pertinent to ascertain what were the respondents' rights on the said land. The answer may be found in s 5 of the Code which says:

(1) As from the 1st day of January, 1958, native customary rights may be created in accordance with the native customary law of the community or communities concern by any of the methods specified in subsection (2), if a permit is obtained under section 10, upon Interior Area Land ...

(2) The methods by which native customary rights may be acquired are —

(a) the felling of virgin jungle and the occupation of the land thereby cleared;

(b) the planting of land with fruit trees;

(c) the occupation or cultivation of land;

(d) the use of land for a burial ground or shrine;

(e) the use of land of any class for rights of way; or

(f) any other lawful method ...

[33] As cultivation on the said land is a customary right under s 5(2)(c) of the Code, and cultivation means the planting of any form of crops in the soil which, in my opinion, must include trees that can be harvested, then deprivation of these cultivated crops must be compensated when the Extinguishment Direction came into effect. The word compensation in s 5(3) of the Code must be given a purposive interpretation since the entire objective of this provision is to place in the hands of the owners expropriated the full money equivalent of the thing for which they have been deprived. Since the respondents were deprived of their crops by the appellants, the appellants must compensate them for such deprivation.

[34] For these reasons, this second contention of the appellants is unsustainable.

Third contention: Unfair, unreasonable, morally wrong and against public policy to compensate the respondents for the said trees

[35] This final contention of the appellants touches on morality and public policy. It is strange that the appellants considered it unreasonable and unfair to pay the respondents for the said trees when they were planted through the efforts of the respondents. On the contrary, if compensation is not paid for the said trees, the appellants would be the sole beneficiaries of these valuable trees without having put in any effort nor spending a single cent for them. In the face of such glaring inequality, I am indeed surprised to find the appellants raising equitable principles when the scale of equity tilts against them. In any event, as equity follows the law and the law depicts that the respondents should be compensated, the question of morality and public policy must make way for the law.

CONCLUSION

[36] In conclusion, for reasons as stated, the appeal should be dismissed with costs and that the deposit for this appeal be paid to the respondents towards the account of taxed costs.

[37] My brothers Justice Hasan Lah and Justice Abu Samah Nordin have read this judgment in draft and concurred with the contents therein.

Appeal dismissed with costs.

Reported by K Nesan